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No. 91-1195

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

BEIJING EVER BRIGHT INDUSTRIAL COMPANY,
Petitioner,

v.

TIMBER FALLING CONSULTANTS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner misstates the issues properly presented to this Court.

1. Constitutionality of National Contacts Standard. The issue, properly stated, is whether the personal jurisdiction provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1601 et seq. ("FSIA"), violate the Due Process Clause of the Fifth Amendment. That issue was not presented to the courts below.

2. Service of Process.
The issue presented is whether the Ninth Circuit Court of Appeals erred in concluding that service of process need not be effected pursuant to an optional procedure set forth in a bilateral consular convention between the United States and the People's Republic of China ("PRC") under the circumstances of this case.

3. Relief From Default Judgment.
The issue presented is whether the Ninth Circuit Court of Appeals erred in concluding that the district court did not abuse its discretion in declining to set aside the default judgment under the circumstances of this case.

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STATEMENT OF THE CASE

Respondent, Timber Falling Consultants, Inc. ("TFC")*, supplements and clarifies petitioner's statement as follows.

A. Facts Material to Consideration of Questions Presented.

Petitioner, Beijing Ever Bright Industrial Company ("Beijing Ever Bright"), has misstated and omitted facts found by the district court[1] and established by the record. TFC summarizes some of the more pertinent misstatements and omissions here, as required by Supreme Court Rule 15.1.

1. Beijing Ever Bright.

Beijing Ever Bright claims that it had virtually no contacts with either the state of Oregon or with the United States; the record is to the contrary.[2] One of Beijing Ever

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* TFC has no parent or subsidiary corporations. See Supreme Court Rule 29.1.

[1]Under the FSIA, the district court could not enter judgment by default until TFC "establish[ed] [its] claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). TFC submitted evidence in support of its claim; based on that evidence, the district court found that TFC was entitled to relief. *See* Opinion dated May 31, 1990, Supp ER 199. Beijing Ever Bright did not challenge the sufficiency of evidence supporting the district court's findings; those findings cannot be challenged for the first time here.

[2]Beijing Ever Bright's assertion of absence of contacts is subject to serious question in light of its refusal to obey the district court's orders to disclose the whereabouts of assets, a refusal that has resulted in an order of contempt that is the subject of a separate appeal pending before the Ninth Circuit Court of Appeals. *See* Appeal Nos. 91-35966 and 91-36059.

Bright's officers, Zhu Yuanchang ("Zhu"),[3] negotiated many transactions with a California export company (Richmark Corporation) that Zhu referred to as Beijing Ever Bright's "West Coast agent." Affidavit of George E. Stafford, ER 195, ¶ 2.

That "agent" had numerous contacts with the state of Oregon, including negotiating the original contract with TFC and meeting with TFC's president in Portland, Oregon. Affidavit of D. Douglas Dent ("Dent Aff."), ER 195, ¶¶ 4, 5, 19; Affidavit of John F. Neupert ("Neupert Aff."), ER 233, ¶ 8.

Beijing Ever Bright also sent two of its officers to the state of Washington to establish a new corporation (known as Ever Bright Timber) to be used to send logs from the Pacific Northwest to the PRC. Neupert Aff., ER 233, ¶¶ 20-21. Beijing Ever Bright dispatched a ship to Oregon to take possession of logs it had purchased from Oregon. Dent Aff., ER 195, ¶¶ 11-12.

During 1988-89, Beijing Ever Bright transferred more than $4.6 million to an affiliated New York corporation, Solid Beam Industrial Corp. ("Solid Beam"), for various business dealings in the United States. Affidavit of Ni Zhen, Supp ER, Tab 1, ¶ 4, and Ex. B. *See also* Neupert Aff., Supp ER 259, ¶¶ 5-8, and Ex. D. Solid Beam refers to itself as Beijing Ever Bright's United States "agent." Affidavit of Daniel O. Norris, Supp ER 49, ¶ 3, and Ex. D. Beijing Ever Bright transferred $7.5 million to Solid Beam to fund the purchase of a 51 percent interest in a Pennsylvania engineering firm. Neupert Aff., Supp ER 259, ¶ 8. During the period 1987-89, Beijing Ever Bright entered into at least nine separate engineering contracts with that firm. Neupert Aff., CR 369, ¶ 7, and Ex. C.

[3]Zhu's conduct is the principal basis for the district court's conclusion that Beijing Ever Bright participated in a civil conspiracy to defraud TFC. *See* Opinion dated May 31, 1990, Supp ER 200, p. 3, lines 13-15.

2. The Contract.

Beijing Ever Bright claims that it was "not aware" that TFC was involved in the underlying transaction. However, the letter of credit furnished by Beijing Ever Bright to provide for payment of the logs specifically provides that it is transferrable *to TFC*. Neupert Aff., ER 233, ¶ 10, and Ex. H.

Beijing Ever Bright states that the parties "disagree" on the nature of the meeting that took place in Los Angeles. The record does not reflect any such disagreement. According to TFC, prior to the meeting, an illegal kickback was solicited, in part, for the benefit of Zhu, one of Beijing Ever Bright's officers. Dent Aff., ER 195, ¶ 19. Zhu then met with TFC in California and threatened to "tear up" the underlying contract unless TFC agreed to various contract concessions. Dent Aff., ER 195, ¶¶ 13-14. The record does not establish any dispute over these facts; Beijing Ever Bright simply states that it has "no knowledge of any such wrongdoing" and that Zhu "is presently under criminal investigation in China." Liu Certification, ER 225, ¶ 26.

Beijing Ever Bright also claims that, after the transaction with TFC fell apart, it obtained "commercially reasonable cover" (i.e., logs) that were inspected in Oregon, but not by employees of Beijing Ever Bright. However, the record actually establishes that replacement logs were obtained from another Oregon company that paid a $30,000 kickback, at least $10,000 of which was paid to Zhu in California. Dent Aff., ER 195, ¶ 19. Zhu personally inspected logs being loaded on a ship in Oregon. Neupert Aff., ER 233, ¶ 11; Dent Aff., ER 195, ¶ 13.

3. The Litigation.

Beijing Ever Bright claims that Richmark Corporation initiated the litigation "without advising or informing Beijing

Ever Bright"; that "fact" is not established anywhere in the record.

4. Attempted Service on Beijing Ever Bright.

Beijing Ever Bright states that the Consular Convention between the United States and the PRC, 33 U.S.T. 2973, T.I.A.S. No. 10209 ("the Consular Convention"), provides an "agreed upon method for service of judicial documents through the consular officers." In fact, of the 42 articles in the Consular Convention, only one article concerns service of judicial documents, and that article does not require or direct such service. Consular Convention, Article 29. Furthermore, there is no "agreement" by either nation to utilize this method of service.

5. The Response of Beijing Ever Bright and the PRC to the Documents Delivered.

Beijing Ever Bright argues that its receipt of the documents served by DHL Worldwide Courier "caused no small amount of confusion at Beijing Ever Bright." However, the record reflects that Beijing Ever Bright's in-house counsel understood that Beijing Ever Bright "must respond or risk having a default judgment taken against it * * * ." Liu Cert., ER 225, ¶ 7.

Beijing Ever Bright states that it did not respond to TFC's claims because of the "domestic situation" in the PRC, "serious diplomatic obstacles," and the "instructions of the Ministry of Foreign Affairs." However, there was never any "instruction" by the Ministry of Foreign Affairs that Beijing Ever Bright should not appear in the litigation. Rather, the Ministry of Foreign Affairs merely denied the application submitted by Beijing Ever Bright's in-house counsel for an exit permit. Liu Cert., ER 225, ¶ 6.

Similarly, the "domestic situation" and other "obstacles" may have impeded the in-house counsel's ability to travel to the United States, but they did not "prevent" Beijing Ever Bright from making an appearance, or at least contacting the court or counsel by letter, telephone, or fax.[4]

During the same period of time that Beijing Ever Bright's in-house counsel had difficulty leaving the PRC, Beijing Ever Bright was able to send two of its officers to Seattle, Washington, to form Ever Bright Timber; those officers retained a large Seattle law firm to handle immigration work. Neupert Aff., ER 233, ¶¶ 3, 20-21, and Exs. P and Q. Beijing Ever Bright was also transferring millions of dollars to Solid Beam in New York during that same period. Ni Zhen Aff., Supp ER Tab 1, ¶ 4, and Ex. B; Neupert Aff., Supp ER 259, ¶ 8.

6. The Immediate Response of Beijing Ever Bright to the Default Judgment.

Beijing Ever Bright neglects to mention that the primary argument that it advanced in its Rule 60(b) motion to set aside the judgment and in its opening brief on appeal was that it was *not* an "agency or instrumentality" of the PRC, as defined in the FSIA. The only argument on personal jurisdiction presented to the district court was a contention that the district court could not exercise personal jurisdiction under the FSIA because Beijing Ever Bright was *not* an "agency or instrumentality" of the PRC.[5]

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[4]Beijing Ever Bright has subsequently been able to retain attorneys in New York, Minneapolis, and Portland to represent it, even though its in-house counsel has apparently remained in the PRC.

[5]Beijing Ever Bright conceded at oral argument on appeal that it is an "agency or instrumentality" of the PRC. *See Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1446 n.1 (1991).

B. The Decision of the Court of Appeals.

Beijing Ever Bright correctly states that the Ninth Circuit Court of Appeals decided the issue of personal jurisdiction by analyzing contacts between Beijing Ever Bright and the United States. However, this analysis was based on the interpretation of the FSIA previously adopted by the Ninth Circuit (and every other circuit) that has addressed the issue. The question of whether the FSIA's personal jurisdiction provision, which bases jurisdiction on contacts with the United States, rather than with the forum state, is constitutional under the Due Process Clause of the Fifth Amendment, was not presented to, nor decided by, the Ninth Circuit.[6]

REASONS FOR DENYING THE WRIT

I. THE CONSTITUTIONAL QUESTION IS NOT RIPE FOR REVIEW BECAUSE IT WAS NOT PRESENTED TO THE COURTS BELOW AND THERE IS NO SPLIT AMONG THE CIRCUITS ON THE ISSUE.

A. The Constitutional Question Raised By Beijing Ever Bright Was Not Presented To, Or Decided By, The District Court Or The Court Of Appeals.

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[6]In its opening brief before the Ninth Circuit, Beijing Ever Bright presented two arguments on the issue of personal jurisdiction. First, it argued that the FSIA "is inapplicable to Beijing Ever Bright because Beijing Ever Bright is not an agency or instrumentality of a foreign government." Appellant's Brief, p. 3. Alternatively, Beijing Ever Bright argued that, even if the FSIA applied, as a factual matter, "[t]he contacts that Beijing Ever Bright has had with the United States are significantly less than the contact that the United States Supreme Court has found inadequate for jurisdiction in other cases." Appellant's Brief, p. 3.

Beijing Ever Bright argues that basing personal jurisdiction on a foreign agency's contacts with the United States, as provided in the FSIA, rather than on contacts with the forum state, violates the Due Process Clause of the Fifth Amendment. That issue, which necessarily challenges the constitutionality of the jurisdictional provisions of the FSIA,[7] was not decided by the Ninth Circuit (*see* 937 F.2d at 1444) or by the district court (*see Richmark Corp. v. Timber Falling Consultants, Inc.*, 747 F.Supp. 1409 (D.Or. 1990)).

Under such circumstances, it would be inappropriate for the Court to grant certiorari to address the issue here. The Court does not grant certiorari to address issues that were not raised in the court of appeals. *See, e.g., EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (dismissing writ as improvidently granted because the court's "normal practice * * * is to refrain from addressing issues not raised in the Court of Appeals").

The fact that an agency of a foreign sovereign is involved does not warrant departure from the rule stated above. In *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), the Court declined to address the issue of whether a foreign state had a Seventh Amendment "right" to trial by jury in light of the FSIA, stating:

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[7]Under the FSIA, personal jurisdiction exists whenever an exception to sovereign immunity applies and service of process is effected in accordance with the statute. 28 U.S.C. § 1330(b). The exceptions to sovereign immunity set forth in the FSIA are based upon contacts with the United States, not the forum state. 28 U.S.C. § 1605. Beijing Ever Bright, by challenging on constitutional grounds the district court's exercise of personal jurisdiction based on contacts with the United States, necessarily challenges the constitutionality of the jurisdictional provisions of the FSIA. *See Shaffer v. Heitner*, 433 U.S. 186, 189 (1977) (due process challenge to exercise of personal jurisdiction under Delaware statute "concerns the constitutionality of a Delaware statute").

> "We decline to address this argument because respondent failed to raise it below * * *. * * *
>
> " * * * [W]e lack guidance from the District Court or the Court of Appeals on this issue * * *. * * * We therefore leave for another day the questions respondent's argument raises under the FSIA." 492 U.S. at 38-40 (citations omitted).

The same is true here. Neither the Ninth Circuit nor the district court ruled on the constitutional issue now raised by Beijing Ever Bright. Accordingly, the Court should "leave for another day" the resolution of that issue.

B. The Courts Of Appeals Are Not "Divided" On The Constitutional Issue Raised By Beijing Ever Bright.

As Beijing Ever Bright points out, national contacts were first used in analyzing personal jurisdiction under the FSIA in *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 313-15 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). The *Texas Trading* analysis has been expressly adopted in the Ninth Circuit[8] and has been utilized by every court of appeals that has addressed the issue.[9] No court of

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[8] *See, e.g., Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

[9] *See, e.g., Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 453-54 (6th Cir. 1988); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 n.5 (5th Cir. 1985); *Harris Corp. v. National Iranian Radio*, 691 F.2d 1344, 1352-53 (11th Cir. 1982).

appeals has adopted a contrary approach under the FSIA.[10] There is no "split" that needs to be resolved.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, SERVICE OF PROCESS NEED NOT BE EFFECTED UNDER THE OPTIONAL PROCEDURE SET FORTH IN THE CONSULAR CONVENTION.

TFC relies on the Ninth Circuit Court of Appeals' analysis of this issue. *See* 937 F.2d at 1447-48.

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[10]The circuits are also not divided on the issue outside the context of the FSIA. National contacts are used in analyzing personal jurisdiction under the federal securities, antitrust, and other statutes providing for nationwide service of process. Beijing Ever Bright argues that in these other contexts, this Court's opinion in *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702-03 (1982), has led to an "erosion" of the rationale for the national contacts test. However, the Ninth Circuit rejected the same argument in *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989); other circuit courts of appeal have agreed. *See, e.g., United Rope Distributors v. Seatriumph Marine*, 930 F.2d 532, 534 (7th Cir. 1991); *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1154 (6th Cir. 1990). No court of appeals has reached a contrary conclusion.

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELIEF UNDER RULE 60(b).

A district court's ruling on Rule 60(b) motion is reviewable "only for abuse of discretion." *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 263 n.7 (1978). The Ninth Circuit correctly concluded that there was no abuse of discretion under the circumstances of this case; there is no reason why this Court needs to review the affirmance of that discretionary ruling in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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